



circumstances, Defendants' use of water to irrigate the disputed tracts constituted a beneficial use of water.

The determination of beneficial use is a question of fact. Jicarilla Apache Tribe v. United States, 657 F.2d 1126 (10<sup>th</sup> Cir.) 1981. The term "beneficial use" is not defined in either the New Mexico Constitution or New Mexico statutes. Beneficial use of water is "the use of such water as may be necessary for some useful and beneficial purpose in connection with the land from which it is taken." State ex rel. Ericson v. McLean, 62 N.M. 264, 273, 308 P.2d 983, 988 (1957); see also State ex rel. Martinez v. McDermott, 120 N.M. 327, 330, 901 P.2d 745, 748 (1995).


The State of New Mexico ("State") does not dispute that the areas in dispute are irrigated, and the State concedes that irrigation of native grasses and pasture is a beneficial use of water. Objections at p. 3. The State's expert witness testified that grass growth within the disputed areas was "fairly continuous," *Tr. at 4*, and the Special Master observed the grass, as well as lateral ditches within the disputed areas. Special Master Report at 3.

The State's argument is that the naturally occurring rosehips and willows partially covering the disputed areas defeat the beneficial nature of the use of water for irrigating the pasture grass. The State ignores Special Master findings that both the rosehips and the willows are mixed with the grass hay when the tracts are harvested, SM Report at 2-3, Finding Nos. 4.a, 5.a., 6., as well as her finding that the area of the willow-covered acreage is variable in nature. SM Report at 2, Finding Nos. 5.a. These findings are supported not only by Defendant Jose Chacon's testimony, *Tr. at 17*, but also by that of the State's expert witnesses. *Tr. at 43-44* (noticeable differences in 1961 and 1989 aerial photographs in degree of "brushiness"). This witness also testified that the "rosehip" area had been classified as being planted in hay in 1960.

*Tr. at 32, SE Ex. 15.* Another State expert witness testified that the rosehip area was larger in 2001 than it was in 2002. *Tr. at 16-18.* Mr. Chacon testified that the willows encroach naturally, *Tr. at 9*, and that he regularly takes steps to control their growth. *Tr. at 8, 9, 63.* One of the State's expert witnesses agreed that willows do encroach on irrigated lands and that irrigators do take action to deal with the encroachment. *Tr. at 56.* Although Mr. Chacon testified that the willows grow without irrigation, he did not testify that the grass did so. The Special Master found that Defendant irrigates the entire acreage, SM Report at 3, Finding No. 8, and concluded, that although the willows and rosebushes are not included within the State Engineer's crop classification, that under the existing circumstances, Mr. Chacon's practice of harvesting these naturally occurring species along with the grass hay that he irrigates is a beneficial use of water. The State offers neither law nor evidence to the contrary.

In this case, the Special Master's recommendations are supported by the evidence. For the reasons stated above, Defendants respectfully ask this Court to overrule the State's objections and to act according to the recommendations made in the Special Master's Report and recognizes all water rights claims associated with Subfile No. CHGA 003-0019.

Respectfully submitted,

  
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I certify that a copy of this pleading was mailed to the following persons on the 5th day of February, 2004.

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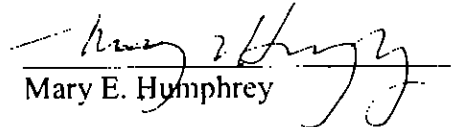
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